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IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

No. 854

LUCKENBACH STEAMSHIP COMPANY,
a corporation,
Petitioner,

vs.

ZIM ISRAEL NAVIGATION COMPANY, LIMITED,
and
HERMAN TELFAIR,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT, ZIM ISRAEL NAVIGATION COMPANY, LIMITED, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI OF LUCKENBACH STEAMSHIP COMPANY

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 2-6)[1] is reported at 428 F.2d 127 (CA 5, 1970).

JURISDICTION

The opinion of the Fifth Circuit was entered on June 19, 1970, and a Petition for Rehearing addressed thereto was denied on July 22, 1970 (Pet.App. 1). Petitioner Luckenbach Steamship Company invokes jurisdiction pursuant to: (1) 28 USC 1254(1) (providing that Certiorari is a method by which this Court may review decisions of the Courts of Appeals), 28 USC

[1] "(Pet.App.)" refers to the Appendix to the Petition for a Writ of Certiorari filed in this case.

2201(c) (providing, inter alia, that a petition for Certiorari in a civil action must be filed within ninety days), and Supreme Court Rules 19(1)(a) and (b), 21 and 22(3).

Of the above-cited provisions only Supreme Court Rule 19 is related to the substantive jurisdiction of this Court. This respondent submits that the petitioner has demonstrated no basis for jurisdiction under Rule 19 criteria. The questions tendered by the petition are purely "episodic" and constitute nothing more than a request that this Court reconsider the evidence and analyze specific facts. Such an analysis would have no negotiable value outside the confines of this case and no relevance whatever to any body of federal law. Respondent submits that there are no "special and important" reasons for assuming jurisdiction under Rule 19.

QUESTION PRESENTED

Although the petitioner presents five questions to the Court, the shipowner respectfully submits that the petitioner's five questions are but variations upon a single theme and that the sole question properly before the Court is as follows:

> WHETHER, UNDER THE PARTICULAR CIRCUMSTANCES OF THE CASE, THE FIFTH CIRCUIT DECISION, HOLDING THE FINDINGS OF FACT BY THE TRIAL COURT WERE SUPPORTED BY COMPETENT EVIDENCE AND THUS NOT CLEARLY ERRONEOUS, IS WORTHY OF CERTIORARI.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner concedes that there are none involved (Petition, page 5) and we agree.

STATEMENT OF THE CASE

This Petition arises out of the shipowner's claim against the stevedore for indemnification in a longshoreman's personal injury suit. The longshoreman sued the shipowner in state court. The shipowner, after removing the case to federal court, brought the stevedore into the case as a third party defendant. The longshoreman's suit against the shipowner was tried to a jury. In the course of the first trial of the longshoreman's claim against the shipowner, the trial judge withdrew from the jury consideration of the issue of the contributory negligence of the longshoreman plaintiff. Subsequently, the Court granted the shipowner's motion for a new trial on the grounds that the issue of contributory negligence should have been submitted to the jury. The shipowner's claim against the stevedore for indemnification was deferred at the first trial pending the outcome of the longshoreman's claim against the shipowner.

At the second trial of the claim of the longshoreman against the shipowner, the shipowner's claim against the stevedore was also tried, but to the judge alone.

The trial judge found that the shipowner was entitled to be indemnified by the stevedore. The stevedore appealed from the judgment awarding indemnity to the shipowner.

The Court of Appeals affirmed the judgment of the District Court.

ARGUMENT

Under this heading we will set forth reasons for denying the writ in this cause.

Petitioner's stated basis for jurisdiction herein is Supreme Court Rule 19(1) (a) and (b). This respondent submits that no basis for jurisdiction has been demonstrated under that rule. The decisions of this Court clearly teach that Rule 19 certiorari jurisdiction (formerly Rule 38(5)) will not be used "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497 (1925). Further, to warrant Rule 19 attention the issues must be "beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L.Ed. 897 (1955).

Luckenbach's contentions as to what conclusions are to be drawn from the evidence have been twice urged upon the trial court and briefed and argued to the Court of Appeals and, each time, rejected.

The stevedore's argument is really that the trial court, after hearing all the evidence (at two trials), found, as facts, (Pet. App. A-13-15) that:

(1) Beam, the first longshoreman down the ladder, slipped and saw grease on his shoe before Telfair, the plaintiff, started down the ladder and saw grease on the ladder before Telfair slipped, but did not warn Telfair of the presence of grease;

(2) under the circumstances Beam should have warned Telfair;

(3) Beam's failure to warn was a failure to perform in a workmanlike manner;

(4) Telfair did not discharge in a workmanlike manner his reponsibility to inspect the ladder his gang was to use;

(5) the grease on the ladder was visible to one standing where Telfair stood before he started down the ladder;

(6) Telfair failed to use reasonable care for his own safety in failing to look where he was going;

(7) White, another longshoreman who saw Beam slip, in keeping with good practice, should have warned Telfair and the others;

(8) the stevedore had no procedure for checking ladders for safety before longshoremen were allowed to use them;

(9) there was no inspection, cursory or otherwise, of the ladder in question made on behalf of the stevedore;

(10) Cursory inspection would have disclosed the grease; and

(11) the stevedore's failure to make a cursory inspection constituted a failure to perform stevedoring services in a workmanlike manner.

There was substantial evidentiary support for these findings of fact and the Court of Appeals, in affirming, properly rejected Luckenbach's invitation to weigh the evidence, evaluate the credibility of the witnesses, and reach conclusions different than those reached by the district court, which had seen and heard the witnesses in two trials. In brief, the Fifth Circuit held the district court's findings of fact passed muster under the "clearly erroneous" concept.

And there is no real question as to the legal sufficiency of these facts to support a judgment for indemnity for, as noted by the Fifth Circuit in its opinion at 438 F.2d 127, 129: "Luckenbach [the stevedore], in its brief, 'agrees that if Beam, the first longshoreman to descend the ladder, actually saw grease on the ladder and had sufficient time to warn Telfair, who was im-

ediately behind him, but failed to do so, there would be an adequate basis under applicable law to hold the stevedore liable for indemnity to the shipowner."

Whether grease was visible, what a cursory inspection would have disclosed, whether there was time to give warning, whether the plaintiff used reasonable care, what is "workmanlike performance" — these are "fact questions" in the purest sense.

This Court does not sit to evaluate the credibility of witnesses or to decide if a given defect was visible.

The impropriety of Luckenbach's request is clear. As stated by this Court in *Berenyi v. District Director, Imm & Nat. Serv.*, 385 U.S. 630, 639, 87 S. Ct. 666, 670, 17 L.Ed.2d 626 (1967):

> "In order to do so [reject as "clearly erroneous" the factual conclusion of the trial court and accepted by the Court of Appeals], we would be forced to disregard this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' E.g., Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275, 69 S.Ct. 535, 538, 93 L.Ed. 672. . . .
>
> The policy underlying the 'two-court' rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force. To be sure, this Court has not hesitated to undertake independent examination of factual issues when constitutional claims may depend on their resolution. See, e.g., Napue v. People of State

> of Illinois, 390 U.S. 204, 271-272, 79 S. Ct. 1173, 1178-1179, 3 L.Ed.2d 1217; Fiske v. State of Kansas, 274 U.S. 380, 385-386, 47 S.Ct. 655, 656-657, 71 L.Ed. 1108. Cf. Hoffa v. United States, 385 U.S. 293, 87 S. Ct. 408, 17 L.Ed.2d 374. But this exceptional doctrine has no application to the present case, for the petitioner makes no claim that any constitutional issues are involved here."

Petitioner suggests a "conflict with Cia Maritima Del Nervion v. James J. Flanagan Ship. Corp., 308 F.2d 120 (CA 5, 1962); Ignatyuk v. Tramp Chartering Corp., 250 F.2d 198 (CA 2, 1957); Caldarola v. Cunard Steamship Company 270 F.2d 475 (CA 2, 1959), cert. denied 364 U.S. 884, 81 S.Ct. 172; Smith v. Joppedvanska Linie-joka Plovidba, 278 F.2d 178 (CA 4, 1960); Santomarco v. United States, 277 F.2d 255 (CA 2, 1960); and Ray v. Compania Naviera Continental, S.A., 203 F.Supp. 206 (D. Md. 1962).

In the Fifth Circuit petitioner strongly urged that *Flanagan* was the controlling case. The Fifth Circuit, through Judge Wisdom, the author of both the *Flanagan* opinion and the opinion presently under consideration, found no conflict with the principles set forth in *Flanagan*.

Cia. Maritima Del Nervion v. James L. Flanagan Ship Corp., 308 F.2d 120 (C.A. 5, 1962) arose out of an accident to the first longshoreman to go down a ladder under circumstances that indicated only a careful inspection or an actual descent of the ladder would disclose the defect and which evoked the conclusion that the stevedore did not have notice of the defect. The court noted that a cursory glance would not necessarily have revealed the defect. As the Court of Appeals observed in *D/S Ove Skou v. Hebert*, 365 F.2d 341 (C.A. 5, 1966) at 349:

"Flanagan states in a negative form what the law does not require *as a matter of law*. This leaves open for traditional assessment by the trier of fact the question of fact as to what constitutes WLP or breach of WWLP."

Ignatyuk v. Tramp Chartering Corp., 250 F.2d 198 (CA 2, 1957) involved a latent defect not an obvious, visible, observed one as was factually found to exist here.

Calderola v. Cunard Steamship Company, 279 F.2d 475 (CA2d 1960), cert. denied 364 U.S. 884, 81 S.Ct. 172, turned on the *factual* decision that the stevedore had neither knowledge nor constructive notice of the presence of greaze on a ladder. The Second Circuit simply held that, absent such knowledge or constructive notice, or a showing that the stevedore's employees created the dangerous condition, the trial court's finding of breach of warranty of workmanlike performance by the stevedore was "without foundation in the evidence and must be reversed."

Smith v. Jugosalvenska Linisjska Plovidea, 278 F.2d 176 (CA 4, 1960) and *Santomarco v. United States*, 277 F.2d 255 (CA 2, 1960) cited by petitioner as conflicting cases, in reality support the opinion of the trial court, in holding that if the stevedore has actual knowledge of an unsafe condition and fails to take remedial measures, it breaches the warranty of workmanlike performance. Here, the trial court found as a matter of fact based on competent evidence, that Luckenbach, through certain of its longshoremen employees, had actual knowledge of the "visibly unsafe" ladder and thus had a duty to prohibit use of the ladder while it was in such a condition. (Pet.App. 13, ¶6), (Pet.App. 14, ¶8).

Ray v. Compania Naviera Continental, S.A., 203 F.Supp. 206 (D.Md. 1962), a decision of a United States District Court in Maryland not sufficient to provide a conflict warranting assumption of jurisdiction, is factually distinguishable. In *Ray* indemnity was denied because the defect in the ladder was *latent and could not have been detected* by the stevedore by any kind of visual inspection as a practical matter. The Court stated at p. 210:

> "Obviously, were a ladder known to be unsafe or could it reasonably be ascertained that it was unsafe, a stevedoring company would be held to have breached its contractual warranty of workmanlike service if it failed to warn of possible danger and to prohibit the use of the unsafe ladder."

In summation, examination of all the cases cited as "conflicting" by petitioner makes it abundantly clear that if the stevedore had knowledge of the unsafe condition, and allowed activties to continue without taking remedial action, it breached its warranty of workmanlike performance owed to the shipowner. The different results in these cases flow from differing facts, not conflicting law.

In the case here under consideration the proper law was applied to the facts as found and the right result was reached.

The decision in the district court (and the affirmance by the Court of Appeals) imposes no new duty upon stevedores. It is simply an affirmation that a stevedore must perform in a workmanlike manner or bear the consequences.

CONCLUSION

For the foregoing reasons it is respectfully submitted that Luckenbach's Petition for a Writ of Certiorari should be denied.

DEWEY R. VILLAREAL, JR., ESQUIRE

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three true copies of the foregoing Brief for Respondent Zim Israel Navigation Company, Limited, in Opposition to Petition for Writ of Certiorari have been mailed to McClain, Turbiville & Heller, 615 Marine Bank Building, Tampa, Florida; Macfarlane, Ferguson, Allison & Kelly, 512 North Florida Avenue, Tampa, Florida, and James O. Davis, Jr., of Brown, Dixon & Shear, 1810 Exchange National Bank Building, Tampa, Florida, Attorneys for Petitioner Luckenbach Steamship Co., and Wagner, Cunningham & Vaughan, 403 Morgan St., Tampa, Florida, and Walter H. Beckham, Jr. and Podhurst and Orseck, 2d Floor, Concord Bldg., 66 West Flagler Street, Miami, Florida, Attorneys for Respondent Herman Telfair, this 7th day of November, 1970.

DEWEY R. VILLAREAL, JR.